

Case C-657/23

Request for a preliminary ruling

Date lodged:

7 November 2023

Referring court:

Nejvyšší správní soud (Supreme Administrative Court) (Czech Republic)

Date of the decision to refer:

4 October 2023

Applicant:

M. K.

Defendant:

Ministerstvo zemědělství (Ministry of Agriculture)

ORDER

The Nejvyšší správní soud has ruled as follows ... in the action brought by the applicant, **M. K.**, ... against the defendant, the **Ministerstvo zemědělství**, ... in an appeal on a point of law lodged by the applicant against the judgment of the Městský soud v Praze (Prague City Court) of 24 June 2021, Ref. No. 14 A 75/2020-55,

... The following question **is referred** to the Court of Justice of the European Union for a preliminary ruling:

Must Article 54(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 be interpreted as meaning that the Member State's authorisation to request recovery of undue payments from the beneficiary lapses upon the expiry of the 18-month time limit laid down that provision?

...

Grounds:

I. Subject matter of the proceedings

- 1 The applicant is a Czech natural person. On 28 June 2012, she submitted an application for a subsidy from the Rural Development Programme of the Czech Republic, Measure III.1.2 Support for business start-ups and the development thereof ('RDP') for a project entitled '*Construction work on a building for a business*'. On 13 March 2013, she signed an agreement relating to the award of a grant, under which she undertook to comply with the rules of the RDP. Following a request for a grant payment, the applicant was paid a grant in the amount of CZK 5 239 422 on 7 July 2015.
- 2 An unscheduled inspection of the project on 29 April 2016 found that no production was taking place in the renovated building. At the time of the inspection, no employees were present, the accessories storage room was empty, the machines were not connected to the power supply, and some of them were located in another owner's building on the site and in the area behind the building. The administrative authority further found that the serial number of the compressor did not match the serial number found during an inspection on 20 April 2015. The information provided by the manufacturer of the extraction and filtration equipment shows that a non-original label with the serial number of another piece of equipment sold to another customer had been placed on the filtration equipment. The objections to the inspection report were considered unfounded. The Státní zemědělský intervenční fond (State Agricultural Intervention Fund; 'the SZIF') therefore stated in its notice of 24 May 2016 imposing a penalty on the beneficiary that the applicant had infringed the rules of the RDP, which entailed a grant reduction of 100%. On 12 September 2016, the defendant's review commission endorsed the action taken by SZIF. The applicant's agent was ... finally convicted of the particularly serious crime of grant fraud.
- 3 On 27 March 2018, administrative proceedings were initiated for an order for recovery of the grant pursuant to Paragraph 11a of Zákon č. 256/2000 Sb., o Státním zemědělském intervenčním fondu a o změně některých dalších zákonů, v rozhodném znění (Law No 256/2000 on the State Agricultural Intervention Fund and amending certain other laws ('the Law on the SZIF'), in conjunction with Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 ('Regulation No 1306/2013'). The SZIF decided to order the applicant to reimburse funds in the amount of CZK 5 239 422 paid as grants under the RDP. On 7 May 2020, the defendant dismissed the applicant's appeal against the decision of the SZIF.
- 4 In the action against the contested decision of the defendant, the Městský soud v Praze (Prague City Court) examined the objection alleging that the State's authorisation to request recovery of the grant from the applicant had lapsed (was

time-barred) since the request for recovery by the State was made after the expiry of the 18-month period for the purposes of Article 54(1) of Regulation No 1306/2013. The Městský soud concluded that, although the State did not request recovery of the grant from the applicant until after the expiry of the period laid down in Article 54(1) of Regulation No 1306/2013, the failure to comply with that period did not mean that the State's authorisation to request recovery of the grant from the beneficiary had lapsed. In the view of the Městský soud, the period laid down in Article 54(1) of Regulation No 1306/2013 is not a limitation period but merely an indicative time limit. In taking that view, the Městský soud departed from the view expressed in the judgment of the Ninth Chamber of the Nejvyšší správní soud (Supreme Administrative Court) of 9 August 2018, No 9 Afs 280/2017 – 57, according to which it was a limitation period.

- 5 In reviewing the judgment of the Městský soud v Praze, the Fifth Chamber of the Nejvyšší správní soud referred the case to an extended chamber. The Fifth Chamber concurred with the reasoning of the Městský soud v Praze. It pointed out that the Ninth Chamber, in its judgment No 9 Afs 280/2017 – 57, did state that the period laid down Article 54(1) of Regulation No 1306/2013 is a limitation period, but did so without stating reasons as to how it had reached its conclusion. The Fifth Chamber considered that on the basis of a historical, linguistic, teleological and systematic interpretation of Article 54(1) of Regulation No 1306/2013 it had to be concluded that the 18-month period for requesting recovery of undue payments from the beneficiary is an indicative time limit and therefore that the Member State is authorised to request recovery of undue payments even after that period has expired.
- 6 ... [It is apparent from paragraph 50 of the judgment in Case 9 Afs 280/2017-57 that the Ninth Chamber considers that Article 54 of Regulation No 1306/2013 is a provision which lays down a limitation period on Member State's authorisation to request recovery of undue payments from the beneficiary.] By contrast, the Fifth Chamber believes that the Member State is authorised to recover the undue payments even after that period has expired.
- 7 ... [Grounds for referring the case to an extended chamber of the Nejvyšší správní soud.]

II. Applicable EU law and national legislation

- 8 In the Czech legal order, the time limits on the procedure for recovery of unduly obtained grants is contained in Paragraph 11a of Law on the SZIF. Until 31 December 2014, Paragraph 11a(3) of the Law on the SZIF was worded as follows: *The Fund shall order the recovery of grants and penalties by decision, enforce such recovery, and take other measures constituting the administration thereof. The Fund shall initiate proceedings for recovery of the grant at the latest within the calendar year following the initial discovery of the irregularity pursuant to the directly applicable legislation of the European Communities.*²²⁾ Footnote 22) referred to Regulation No 1290/2005. From 1 January 2015 to

31 October 2017, the Law on the SZIF contained no amendment of the time limit (for grants which were not provided exclusively from national sources). Under Paragraph 11a(1) of Law on the SZIF, it was merely the case *that in the event of undue payment of a grant covered in whole or in part by funds from the European Union budget, the Fund shall act in accordance with the directly applicable legislation of the European Union²²⁾ and that law*. Footnote 22) in that version lists several EU regulations, including Regulation No 1306/2013 (without reference to any specific provision). Amendment No 295/2017 added the following sentence to Paragraph 11a(1) of the Law on the SZIF with effect from 1 November 2017: *The Fund shall initiate proceedings for recovery of the grant within 10 years from the date on which it was paid at the latest*. At the time of the payment of the grant (7 July 2015), the Czech legal order contained no limitation period which related explicitly to the obligation to request recovery of undue payments from the beneficiary of a grant.

- 9 Under Article 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests ('Regulation No 2988/95'):

1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).

2. The period for implementing the decision establishing the administrative penalty shall be three years. That period shall run from the day on which the decision becomes final.

Instances of interruption and suspension shall be governed by the relevant provisions of national law.

3. Member States shall retain the possibility of applying a period which is longer than that provided for in paragraphs 1 and 2 respectively.

- 10 According to the case-law of the Court of Justice of the European Union ('the Court of Justice'), the limitation period laid down the first paragraph of Article 3(1) of Regulation No 2988/95 applies not only to the imposition of administrative penalties but also to other administrative measures (see judgment of the Court of Justice of 3 September 2015, C-383/14, *FranceAgriMer*, paragraphs 20 to 32).
- 11 Under Article 54(1) of Regulation No 1306/2013, *[f]or any undue payment following the occurrence of irregularity or negligence, Member States shall request recovery from the beneficiary within 18 months after the approval and, where applicable, reception, by the paying agency or body responsible for the recovery, of a control report or similar document, stating that an irregularity has taken place. The corresponding amounts shall be recorded at the time of the recovery request in the debtors' ledger of the paying agency.*

III. Analysis of the question referred for a preliminary ruling

- 12 The Extended Chamber must consider whether the State's authorisation to request recovery of undue payments from the beneficiary of the grant lapses upon expiry of the period laid down in Article 54(1) of Regulation No 1306/2013.
- 13 ...
- 14 The case was referred to the Extended Chamber for interpretation of Article 54(1) of Regulation No 1306/2013 and the Extended Chamber found that it had jurisdiction to hear it. At the same time, in view of the nature of the question, it concluded that the conditions for its obligation to refer the matter to the Court of Justice under Article 267(b) TFEU were fulfilled.
- 15 The initial indication pointing to such a conclusion is that two different chambers of the Nejvyšší správní soud have taken different views on the same question of EU law and it is not apparent that either of them is manifestly incorrect or has subsequently been overtaken. Nor is the Extended Chamber aware that the question of the interpretation of Article 54(1) of Regulation No 1306/2013, in so far as it is relevant to the case before the Nejvyšší správní soud, has been resolved by the case-law of the Court of Justice.
- 16 The nature of the question at issue is the fundamental reason for referring the question. As the Grand Chamber of the Court of Justice stated in its judgment of 6 October 2021, C-561/19, *Consorzio Italian Management*, paragraph 48, '*that being said, the mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision*'. However, the Grand Chamber added in following paragraph 49 that '*nonetheless, where the national court or tribunal of last instance is made aware of the existence of diverging lines of case-law –*

among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law’.

- 17 Unlike the referring Fifth Chamber, which considers the question at issue to be *acte clair* and interprets it in the opposite way to the Ninth Chamber, the Extended Chamber is not satisfied that any of the various interpretations which are possible can be considered clear, credible and, beyond reasonable doubt, obviously more compelling than others.
- 18 However, the interpretation put forward by the Fifth Chamber is tenable and therefore it is possible to conclude on that basis that the Member State’s authorisation to request recovery of undue payments from the beneficiary does not lapse upon the expiry of the period laid down in Article 54(1) of Regulation No 1306/2013. That is supported by the following arguments.
- 19 Regulation No 1306/2013 does not explicitly state that the Member State’s authorisation to request recovery of undue payments from the beneficiary lapses upon the expiry of the time limit laid down Article 54(1) thereof. That distinguishes the time limit laid down in Article 54(1) of Regulation No 1306/2013 from that down in Article 3(1) of Regulation No 2988/95, which expressly refers to the period for irregularity proceedings as a limitation period. Recital 39 of the preamble to Regulation No 1306/2013 expressly refers to the application of Regulation No 2988/95 in detecting and dealing with irregularities. By that reasoning, Regulation No 2988/95 should also apply in detecting and dealing with irregularities under Regulation No 1306/2013. It contains comprehensive rules on limitation periods for the proceedings in which penalties for irregularities are to be imposed, including the conditions for interrupting that period, the latest point in time at which it must lapse, and the possibility for Member States to derogate from the length of the limitation period laid down in that regulation. Therefore, it could be argued that, if the time limit laid down in Article 54(1) of Regulation No 1306/2013 were intended to be a special provision, that special relationship would be explicitly defined in Regulation No 1306/2013 and it would be made clear that the comprehensive provision on time limits contained in Regulation No 2988/95 does not apply or applies only to a certain extent.
- 20 The limitation period for compliance by Member States laid down in Article 54(1) of Regulation No 1306/2013 governs the relationship between the Member State and the European Union, not between the Member State and the individual. Sums recovered following the occurrence of irregularity or negligence and the interest thereon are revenue for the European Agricultural Guarantee Fund (EAGF) and the relevant programme of the European Agricultural Fund for Rural

Development (EAFRD) under Articles 55 and 56 of Regulation No 1306/2013 respectively. If they are not exhausted, those funds are to be repaid to the budget of the European Union. Since the sums recovered are revenue for the EAGF and EAFRD, it is in the interests of the sound budgeting of those funds for the following years, and in the interest of ensuring compliance with the annual ceilings set for each fund, for undue payments to be recovered within a reasonable time after irregularities or negligence justifying the request for recovery of payments from the beneficiary are detected.

- 21 An element of the inclusion of recovered undue payments in the financial planning of the European Union can also be seen in Article 54(2) of Regulation No 1306/2013, under which, where recovery has not taken place within four or eight years respectively of the recovery request, the financial consequences of non-recovery are to be borne half by the European Union and half by the Member State. However, where Member States have not requested the recovery of undue payments within the time limit laid down in Article 54(1) of Regulation (EC) No 1306/2013, the European Commission may adopt a measure excluding the European Union from sharing the financial consequences of the non-recovery of undue payments.
- 22 Therefore, the provision on recovery of undue sums contained in Regulation No 1306/2013 appears to be aimed at ensuring that Member States start recovering undue payments within reasonable time limits as the European Commission can use them in its calculation as revenue for the EAGF or the relevant EAFRD programmes. If that calculation subsequently proves to be incorrect as a result of the fact that the undue payments were not recovered within a reasonable time, the financial consequences thereof are spread equally between the Member State and the European Union. However, that is provided that the Member State has complied with its obligation to request recovery of undue payments promptly from the beneficiary.
- 23 However, it is still not clear from the foregoing that, after the expiry of that period, the Member State is not authorised to continue to request recover undue payments from the beneficiary. The wording in recital 37 of Regulation No 1306/2013 according to which '*in certain cases of negligence by the Member State, it is also right to charge the full sum to the Member State concerned*' supports that conclusion. Therefore, the financial consequences of non-recovery of the irregular payments within a reasonable period of time can only be assigned to the Member State in full on account of the negligence of the Member State resulting in non-recovery of the payments within a reasonable period of time, and not on account of the lapse of the authorisation to recover the undue payments from the beneficiary. In the alternative, it may also be stated that, although Article 54(1) of Regulation No 1306/2013 uses the verb 'shall' in relation to the obligation of the Member State to request recovery of undue payments from the beneficiary, recital 37 of the preamble states that '*Member States "should" request recovery from the beneficiary within 18 months [...]*'. The preamble employs the conditional mood, which often expresses a polite request or an action

which may or may not be carried out in certain situations, and not the imperative mood. Thus, linguistic arguments also support the view that Article 54(1) of Regulation No 1306/2013 expresses an action whose performance as described is desirable, but does not exclude the possibility that it may be performed differently.

- 24 However, the case-law of the Court of Justice and the General Court contains conclusions which could be perceived as indirectly challenging that interpretation.
- 25 In its judgment of 8 May 2019, C-580/17, *Mittetulundusühing Järvelaev*, the Court of Justice interpreted the obligations of a Member State where it emerges that there has been an irregularity in the use of a grant. In paragraphs 94 to 97 it stated ...:

‘94 Therefore, by Question 7, the referring court asks, finally, whether the first paragraph of Article 56 of Regulation No 1306/2013 must be interpreted as precluding the initiation of a recovery procedure for funding unduly paid before the end of the five-year period from the managing authority’s financing decision. That court also asks whether that provision must be interpreted as precluding continuing such a recovery procedure where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure.

95 In the first place, as regards the possibility for a Member State to initiate a recovery procedure for funding unduly paid before the end of the five-year period from the payment of the final instalment of the funding, it should be noted that, in accordance with Article 54(1) and with the first paragraph of Article 56 of Regulation No 1306/2013, a Member State which detects an irregularity is required to recover the funding unduly paid. In particular, the Member State must request recovery from the beneficiary within 18 months after the approval and, where applicable, reception, by the paying agency or body responsible for the recovery of a control report or of a similar document, stating that an irregularity has taken place.

96 It follows that the Member States may and, in the interests of sound financial management of EU resources, must enforce recovery as soon as possible. In those circumstances, the fact that reimbursement is requested before the end of the five-year period starting from the funding decision by the managing authority is irrelevant to that recovery.

97 In the second place, as to whether EU law precludes continuing a recovery procedure where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure, it should be noted, as the Commission states, that, if the beneficiary of funding were afforded the opportunity of remedying, in the course of court proceedings relating to recovery, an irregularity relating to the implementation of the operation, such an opportunity could encourage failure in other beneficiaries, since they would be able to rely on a posteriori remedy after detection thereof by the competent

national authorities. Accordingly, the fact that the beneficiary of the funding endeavours to, or does in fact, remedy that failure in the course of court proceedings relating to recovery is irrelevant to the recovery.

98 The answer to Question 7 is that Article 56 of Regulation No 1306/2013 must be interpreted as not precluding a recovery procedure for funding unduly paid from being initiated before the end of the five-year period from the managing authority's financing decision. That provision must also be interpreted as not precluding such a recovery procedure from being continued where, in the course of the procedure, the beneficiary of the funding remedies the failure which justified the initiation of that procedure.'

- 26 The conclusions of the Court of Justice in paragraph 95 can be interpreted as not precluding the alternative interpretation that the 18-month period laid down in Article 54(1) of Regulation No 1306/2013 for the Member State to request recovery of the payments from the beneficiary is both an indicative period in the relationship between the Member State and the European Union and a limitation period in the relationship between the Member State and the beneficiary. Such an alternative interpretation is less harsh in relation to the individual than the alternative put forward by the Fifth Chamber since, in contrast, if the system of limitation periods laid down in Article 3 of Regulation No 2988/95 were to cover the relationship between the Member State and the individual, the application of the 18-month period laid down in Article 54(1) of Regulation No 1306/2013 could reduce the time within which the Member State may request recovery of payments from the beneficiary.
- 27 The same conclusion about the nature of that period could be drawn from the judgment of the General Court of 8 March 2023, T-235/21, *Bulgaria v Commission*, specifically from paragraph 81, which states ...: *'The obligation to request the recovery of debts affected by the irregularities found in that final report does not stem from Regulation No 883/2013, but from Article 54(1) of Regulation No 1306/2013, which provides that, once the Member State concerned has been notified of the irregularity, it has 18 months in which to request that recovery from the beneficiaries.'* In paragraph 46 of that judgment, the General Court also concurred with the Commission's view on the nature of the 18-month period. *'On that occasion, the Commission pointed out that the Republic of Bulgaria had to request the recovery of undue payments from the beneficiaries within 18 months of the notification of OLAF's final reports following its two investigations. Moreover, the reference to Article 54 of Regulation No 1306/2013 left no room for doubt as to the possibility of financial corrections in the event of failure to respect that time limit.'*
- 28 In the light of the foregoing, therefore, the Extended Chamber considers rather that Article 54(1) of Regulation No 1306/2013 must be interpreted as not precluding Member States from continuing to request recovery of undue payments from beneficiaries of a grant where they have requested recovery of the undue payments from the beneficiary after the expiry of a period of 18 months after the

approval and, where applicable, reception, by the paying agency or body responsible for the recovery, of a control report or similar document, stating that an irregularity has taken place.

- 29 The Extended Chamber also acknowledges, however, that that article may be interpreted differently, namely, that the period of 18 months for the Member State to request recovery from the beneficiary is both an indicative period in the relationship between the Member State and the European Union, but also a limitation period in the relationship between the Member State and the beneficiary of the payment, specifically in relation to the system of time limits laid down in Article 3 of Regulation No 2988/95. Such an interpretation, which is in some respects more favourable to the beneficiary, as an individual distinct from the public authority which makes and applies the law, can, in the view of the Extended Chamber, be rejected only if it is manifestly less compelling than other alternative interpretations. Otherwise, there would be disproportionate interference with the individual's right to legal certainty and the predictability of the rules which are intended to cover him or her. However, a judgment on whether or not that alternative interpretation, which is more favourable to the individual, can be rejected would, in this situation, go beyond the interpretation of EU law within the limits of the concept of *acte clair*, as understood by the case-law of the Court of Justice.
- 30 The referring Fifth Chamber considered that the Ninth Chamber misunderstood the question of EU law. The Fifth Chamber considers that it is *acte clair*, but with a different conclusion as to how it should be interpreted from that previously adopted by the Ninth Chamber. Unlike the referring Fifth Chamber, the Extended Chamber, considers that the question of law at issue cannot be regarded as *acte clair* and therefore refers the question to the Court of Justice for a preliminary ruling. ...

...